It has often been said that the appellate court should be slow in interfering with the findings of fact by a lower court, but where such findings are based on wrongful or unjust inferences drawn by the trial judge, then the appellate court would be abrogating its functions if it refuses to review the findings of the lower court — see *Benmax* v *Austin Motor Co Ltd.*[8]

The inferences drawn in the present instance are wrongful, unjust and unsustainable. For the above reasons, I allow this appeal and quash the conviction. The fine, if paid, is to be refunded to the appellant.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.*

Reported by *PS Ranjan*

Re Perusahaan Jenwatt Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D3-42-86-88
ZAKARIA YATIM J
30 NOVEMBER 1989

Companies and Corporations — Winding up — Inability to pay debts — Statutory notice of demand — Amount stated in notice in excess of amount due — Notice not complied with — Whether notice valid — Whether company unable to pay its debts — Companies Act 1965, s 218(2)(a)

The government of Malaysia obtained a judgment in default of appearance against a company for the sum of $25,987.50 with interest thereon calculated at the rate of 8% pa from the date of judgment to the date of realization and costs of $225. The government then sent a notice of demand to the company for the sum of $295,584.46 pursuant to s 218(2)(a) of the Companies Act 1965. Subsequently, the government presented to the court a petition for the winding up of the company on the ground that the company was unable to pay its debts. In the petition, the government stated that the company was indebted to the government in the sum of $29,584.46 and that the company had not complied with the notice of demand. The company applied to the court for an order setting aside the petition on the ground that the notice was invalid as the company did not owe the government the amount stated in the notice.

Held, allowing the applicant's application:

(1) Section 218(2)(a) of the Act should be given a literal interpretation and the notice of demand must comply strictly with the requirements of s 218(2)(a).

(2) In the present case, the notice of demand had not complied strictly with the requirements of s 218(2)(a). Since the amount stated in the said notice was far in excess of the debt due, the failure on the part of the company to pay the sum claimed did not mean that the company was unable to pay its debts. The notice of demand was bad and the court could not presume that the company was unable to pay its debts.

Cases referred to

1 *Processed Sand Pty Ltd* v *Thiess Contractors Pty Ltd*; *Breen Holding Pty Ltd* v *Thiess Contractors Pty Ltd* (1983) 1 ACLC 1069; 7 ACLR 956 (follld)
2 *Deputy Commissioner of Taxation* v *Cye International Pty Ltd (No 2)* (1986) 10 ACLR 305 (follld)
3 *Re Fabo Pty Ltd* (1989) 7 ACLC 19; 14 ACLR 518 (not follld)
4 *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 (refd)
5 *Re A Company* [1984] 1 WLR 1090 (follld)

Legislation referred to

Companies Act 1965 s 218(2)(a)

M Pathmanathan for the respondent.
Mustaffa bin Ibrahim for the government of Malaysia.
Lee Ee Kwang for the Official Receiver.

Cur Adv Vult

Zakaria Yatim J: This is an application by a company, Perusahaan Jenwatt Sdn Bhd (hereinafter referred to as 'the company') seeking the order of the court that the winding-up petition filed by the petitioning creditor on 15 February 1988 be set aside. The company also asks that the costs of and incidental to these proceedings be paid by the petitioning creditor in any event.

In the affidavit in support of the application, the managing director of the company averred, inter alia, that in para 6 of the petition, the petitioning creditor stated that the indebtedness of the company was in the sum of $29,584.46. He then referred to the notice of demand, dated 16 June 1987 sent by the petitioning creditor under s 218 of the Companies Act 1965. In the notice, a demand was made by the petitioning creditor for a sum of $295,584.46. According to the deponent, the notice was invalid as the company did not owe the petitioning creditor the amount stated in the notice.

I shall now examine the petition itself. In para 5 of the petition, it is stated that the company was indebted to the petitioning creditor in the sum of $29,584.46. In para 6 of the petition, the petitioning creditor states that it has made application to the company for the payment of its debt by serving a notice of demand dated 16 June 1987 pursuant to s 218(2)(a) of the Companies Act 1965 by leaving a copy of the said notice at the registered office of the company. According to the petitioning creditor, no payment had been received after service of the said notice. A copy of the said notice is annexed to the petition and marked DTCI. The said notice is reproduced below:

> Jabatan Hasil Dalam Negeri,
> Cawangan Pungutan,
> (Tingkat 7-12),
> Blok 11, Komplek Bangunan Kerajaan,
> Jalan Duta,
> 50600 Kuala Lumpur.
> Telefon: KL 2540066 & 2547055
> Ruj Kami: X/C 884026 - 01 dlm PJA.
>
> Saya, Teo Tee Cheam Penolong Pangarah Kanan, Hasil Dalam Negeri, Komplek Bangunan Kerajaan, Jalan Duta,

50600 Kuala Lumpur, dengan ini menuntut bayaran sepertimana yang diperuntukkan dalam seksyen 218(2)(a) Akta Syarikat 1965, dalam *tempuh TIGA (3) minggu* dari tarikh penyerahnan notice tuntutan ini bagi jumlah dalam hukuman Guaman Sibil No P859/1985.

Jumlah Tuntutan dalam hukuman $295,584.46
Bertarikh 16 June 1987.

tt
(Teo Tee Cheam)

Penolong Pengarah Kanan, Hasil Dalam Negeri,
Kompleks Bangunan Kerajaan, Jalan Duta,
50600 Kuala Lumpur.

Kepada:

Perusahaan Jenwatt Sdn Bhd
MY Business Consultants Sdn Bhd,
33B, 2nd Floor, (Front), Wisma CL Yap,
Jalan Tengku Kelana, Kelang

Paragraph 7 of the petition states that the company is unable to pay its debt and in the circumstances it is just and equitable that the company be wound up.

It is clear that the notice of demand relied upon by the petitioning creditor in the petition is the notice reproduced above and as pointed by Mr Pathmanathan, counsel for the company, the amount stated in the notice far exceeded the amount stated in the petition.

It appears that the petitioning creditor filed the petition on the basis of a judgment debt. The judgment which was obtained in default of appearance was in the sum of $25,987.50 plus interest at the rate of 8% pa from the date of judgment to the date of realization and costs of $225.

The petitioning creditor in its affidavit affirmed on 23 May 1988 averred that the correct amount claimed by the petitioning creditor based on the judgment debt was $29,584.46 and not $295,584.46 as claimed by the company. According to the petitioning creditor, the original notice was served on the company on 16 June 1987. Exhibited to the said affidavit is a copy of the notice stating the amount of $29,584.46. According to the deponent the original notice was sent to the company.

In considering the present application, the court has to consider the petition and the notice annexed to it. It is clear that the amount stated in the notice far exceeds the amount due as stated in para 5 of the petition. The question that arises here is whether the company which failed to comply with the requirements of the notice, is deemed to be unable to pay its debts. The Australian decisions appear to be conflicting on this point.

In the *Processed Sand Pty Ltd* v *Thiess Contractors Pty Ltd; Breen Holdings Pty Ltd* v *Thiess Contractors Pty Ltd*,[1] the Supreme Court of New South Wales decided that a notice of demand which claimed more than the amount actually due would not come within s 364 (2) of the Companies Act 1981 and non-compliance with it would not give rise to any deemed inability on the part of the company to pay its debts. Section 364(2) of the Companies Act is identical with our s 218(2)(a). Similarly, in *Deputy Commissioner of Taxation* v *Cye International Pty Ltd (No 2)*,[2] the Supreme Court of New South Wales decided that a demand for an additional sum over and above the amount which was due at the date of the demand vitiated it as a proper demand under s 364 of the Companies (NSW) Code. The case of *Processed Sand Pty Ltd*[1] was followed in that case.

The Supreme Court of Victoria on the other hand expressed a different view in *Re Fabo Pty Ltd.*[3] In that case, the Deputy Commissioner of Taxation sought to wind up Fabo Pty Ltd on the grounds that it was unable to pay its debts. The Commissioner relied upon the failure of the company to comply with the notice served upon it pursuant to section 364(2)(a) of the Companies Code. Although the company had not responded to the notice, the master found that the Commissioner was seeking to rely upon a notice which overstated the debt owed to it by the company. The matter was referred to the full court for consideration. It was held that Fabo Pty Ltd be wound up. The court also held that overstatement per se was insufficient to invalidate the notice. The court was of the view that in construing s 364(2)(a), it should not adopt a literal interpretation. The court said:

> A literal interpretation would compel the court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed debt exceeding $1,000 has remained unpaid after the making of a proven demand without any reasonable explanation being advanced for this failure to do so... By contrast the wider interpretation avoids such unfortunate consequences, is consistent with the legislative scheme underlying the provisions and permits the court to make a winding-up order where it is appropriate to do so.

With respect, I am inclined to follow the decisions in *Processed Sand Pty Ltd* v *Thiess Contractors Pty Ltd*, and *Deputy Commissioner of Taxation* v *Cye International Pty Ltd*[2] for the following reasons. First, in *Processed Sand Pty Ltd*[1] s 364(2) of the Australian Companies Act was given a literal interpretation. Waddell J in his judgment in that case said:

> ... But there are, in my opinion, much stronger considerations which indicate that the provision should be given a literal interpretation. Its effect is to provide a statutory admission that a company is unable to pay its debts. One would expect such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability. It would seem arbitrary and unjust to create an admission arising on failure to pay... a debt, a part of which was not due.

I agree with the passage quoted above. In my view s 218(2)(a) of our Act should be given a literal interpretation. This view is consistent with what I have stated either

in another case, viz that the notice of demand must comply strictly with the requirements of s 218(2)(a). See *Re Yap Kim Kee*.[4]

Secondly, *Processed Sand Pty Ltd* v *Theiss Contractors Pty Ltd*[1] and *Deputy Commissioner of Taxation* v *Cye International Pty Ltd*[2] appear to be consistent with the decision of the Court in England in *Re A Company*.[4] In that case, Mervyn Davies J in his judgment at p 1095 said:

> When the demand was made, the amount due to the petitioner was not known to the company... At the time of the demand the company knew there was a dispute and were willing to pay £2,234.38 but that is not to say that they knew that the sum due was £2,234.38. They knew that the petitioner was alleging the sum due to be £12,435.75. As to the petitioner, it knew that the company were disputing liability in that sum. In these circumstances I do not see how the petitioner was in any position to make a genuine demand for a specified sum. *Section 223(a) contemplates a creditor being able to point to a debt of a specified sum that cannot be seriously questioned either as to existence or quantum.* It follows that the petitioner was not at liberty to make use of s 223(a)... I am satisfied that the statutory demand ought not to have been served... (Emphasis added.)

In the present case, the notice of demand has not complied strictly with the requirements of s 218(2)(a). Since the amount stated in the said notice is far in excess of the debt due, failure on the part of the company to pay the sum claimed does not mean that the company is unable to pay its debt under the section. The notice of demand is therefore bad and the court cannot presume that the company is unable to pay its debts.

In the circumstances, I set aside the petition filed on 15 February 1988 with costs to the company in any event. The petitioning creditor is at liberty to file a fresh petition.

Application allowed.

Solicitors: *Yusuf Lee Pathma & Marbeck.*

Reported by *PS Ranjan*

Re Kuala Lumpur Industries Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3-24-277 OF 1989
VC GEORGE J
28 NOVEMBER 1989

Companies and Corporations — Scheme of arrangement — Restraint of proceedings — Companies Act 1965 not tagged on to a s 176(1) application — Considerations in making order — Companies Act 1965, s 176(1) & 10

The plaintiffs were restrained from proceeding against the members of a group of companies ('the group') for a period of two months by an order made under s 176(10) of the Companies Act 1965 obtained by the group by way of an ex parte originating summons on 7 October 1989. At the date, an application under s 176(1) had not been filed. The plaintiffs later filed an application seeking leave to intervene in the originating summons to move the court to set aside the s 176(10) order obtained by the group on the ground that the court did not have the jurisdiction to make the order, and that in any event the order should not have been made. The plaintiffs argued that:

1) the court had no jurisdiction to make a s 176(10) order without there being a s 176(1) application; and
2) unless there had been a proposed scheme of compromise or arrangement between the company and its creditors, the court had no jurisdiction to make a s 176(10) order.

Held, dismissing the plaintiffs' application:

(1) The policy of s 176(10) is not such that a s 176(10) application has to be tagged on to a s 176(1) application, and the two may be brought independently of the other.

(2) In making a s 176(10) order, there must be a proposal of the scheme of compromise or arrangement (not necessarily ready for presenting to the creditors to be voted upon) but with sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. Further, the court has to be satisfied that there is or there would be a bona fide s 176(1) application. It is unnecessary that the proposal must emanate from the company to its members or to the creditors; the proposal could emanate from anybody. It is also not necessary that there should be a scheme in a complete form capable of being presented to the creditors for being voted on.

(3) In the instant case, it has to be assumed that the court which gave the ex parte order was satisfied that there was a proposal within the meaning of s 176. In any event, the present court was satisfied that there had come into existence a proposal, and the particulars of the scheme as exhibited gave more than a general layout of the scheme sufficient for the court to determine whether it was feasible. In addition, the intention to use s 176(1) was bona fide as, inter alia, merchant bankers had been commissioned and appeared to have directed their minds to putting up the scheme.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 03-157-89.]

Cases referred to

1 *Re Clements Langford Pty Ltd* (1961) VR 453 (refd)
2 *Re GAE Pty Ltd* (1962) VR 252 (folld)